

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
March 17, 2009 Session

**STATE OF TENNESSEE v. HOLLY A. HATCHER**

**Direct Appeal from the Criminal Court for Sumner County  
No. CR14-2008      Dee David Gay, Judge**

---

**No. M2008-02042-CCA-R10-CO - Filed February 10, 2010**

---

Defendant, Holly Hatcher, was indicted on three counts of statutory rape by an authority figure, a Class C felony, and applied for pretrial diversion. The assistant district attorney general denied her application, and Defendant petitioned the trial court for a writ of certiorari to review the decision. The trial court determined that the assistant district attorney general had not abused her discretion in denying pretrial diversion. Pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, Defendant now appeals from the decision of the trial court affirming the assistant district attorney general's denial of her application for pretrial diversion. After a thorough review, we reverse the trial court's order affirming the denial of pretrial diversion and remand this matter for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right;  
Judgment of the Criminal Court Reversed and Remanded**

THOMAS T. WOODALL, J., delivered the opinion of the Court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

William L. Moore, Jr., Gallatin, Tennessee, for the appellant, Holly A. Hatcher.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Lawrence Ray Whitley, District Attorney General; and Sallie Wade Brown, Assistant District Attorney General, for the appellee, the State of Tennessee.

## **OPINION**

### **I. Background**

According to the State's response to Defendant's application for pretrial diversion, on October 25, 2007, the Gallatin Police Department was notified of a possible sexual relationship between Defendant, a twenty-five-year-old teacher and volleyball coach at Gallatin High School, and E.I., a seventeen-year-old student. (The minor victim will be referred to by his initials). E.I. and his father were interviewed at the police department during which E.I. admitted that he had been involved in a sexual relationship with Defendant since the first of the school year. During the interview, E.I. showed his cell phone to the investigating officers. It contained photographs of Defendant, either nude or partially nude, which had been sent by Defendant to E.I.

E.I. stated that he obtained Defendant's cell number from a student on Defendant's volleyball team on August 16, 2007, and E.I. began to send text messages to Defendant. Defendant and E.I. met several times between August 25, 2007, until September 8, 2007, when they first engaged in sexual intercourse. In its response to Defendant's request for pretrial diversion, the State lists twelve occasions when Defendant and E.I. had sexual relations, the last two incidents occurring on October 20, 2007. Cell phone records for both E.I. and Defendant showed that approximately 300 cell phone calls were exchanged between August 25, 2007, and October 26, 2007. Fifty-six calls were placed during school hours or early in the morning before school.

Based on these facts, the Sumner County grand jury returned an indictment charging Defendant with three counts of statutory rape by an authority figure. Subsequently, Defendant filed an application for pretrial diversion which the State denied. Defendant then filed a petition for writ of certiorari with the trial court, and the trial court affirmed the State's decision.

### **II. Analysis**

Defendant filed a Rule 10 application for extraordinary appeal arguing that the State (1) failed to identify the weight accorded to the positive and negative factors considered during the review of Defendant's application; (2) failed to properly consider Defendant's amenability to correction and considered irrelevant information; and (3) improperly relied on the personal opinions of the investigating officers concerning the grant of pretrial diversion.

Pursuant to Tennessee Code Annotated section 40-15-105(a)(1)(A), a district attorney general and a defendant may enter into an agreement to suspend prosecution of the defendant for a period not to exceed two years. To qualify for diversion, the defendant must meet three criteria: (1) he or she must not have previously been granted diversion; (2) he or she must not have a prior misdemeanor conviction for which a sentence of confinement was served or a prior felony within a five-year period after completing the sentence or probationary period for such conviction; and (3) he or she must not be presently charged with one of an enumerated list of offenses. T.C.A. § 40-15-105(a)(1)(B)(ii). A defendant eligible for consideration for pretrial diversion is not presumptively entitled to a grant of pretrial diversion. *State v. McKim*, 215 S.W.3d 781, 786 (Tenn. 2007) (citing *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999)). The defendant has the burden of establishing that pretrial diversion is appropriate. *State v. Bell*, 69 S.W.3d 171, 179 (Tenn. 2002).

Tennessee Code Annotated section 40-15-105(b)(3) conveys the discretion to grant or deny an application for pretrial diversion upon the district attorney general. The district attorney general's analysis must be conducted on a case-by-case basis. *State v. Markham*, 755 S.W.2d 850, 853 (Tenn. Crim. App. 1988). He or she must consider several factors when reviewing an application for pretrial diversion, including: the circumstances of the offense; the defendant's criminal record and social history; the physical and mental condition of the defendant; and the likelihood that pretrial diversion will serve the ends of justice and the best interest of both the public and the defendant. *State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983). "In determining whether to grant pretrial diversion, the district attorney general 'has a duty to exercise his or her discretion by focusing on a defendant's amenability for correction and by considering all of the relevant factors, including evidence that is favorable to a defendant.'" *McKim*, 215 S.W.3d at 786 (quoting *Bell*, 69 S.W.3d at 178).

If the district attorney general denies the application for pretrial diversion, "the factors upon which the denial is based must be clearly articulable and stated in the record." *McKim*, 215 S.W.3d at 787. The denial must be written and must list the evidence considered and discuss which factors were considered and the weight accorded to each. *State v. Pinkham*, 955 S.W.2d 956, 960 (Tenn. 1997). If the district attorney general denies the application, the defendant may seek review in the trial court pursuant to Tennessee Code Annotated section 40-15-105(b)(3).

The trial court may only review the evidence considered by the district attorney general, and the court's role is to determine whether the district attorney general abused his or her discretion. *Bell*, 69 S.W.3d at 177. The trial court may conduct a hearing only to resolve factual disputes raised by either the defendant or the district attorney general. *Id.* The trial court may not hear additional evidence not considered by the prosecutor. *Curry*, 988 S.W.2d at 157-58. The decision of the district attorney general to deny pretrial diversion

is considered “presumptively correct.” *Id.* The trial court cannot set aside the denial unless it finds a gross and patent abuse of discretion. *State v. Hammersley*, 650 S.W.2d at 356. The trial court should examine each relevant factor in the pretrial diversion process to determine whether the district attorney general has considered that factor and whether the district attorney general’s finding with respect to that factor is supported by substantial evidence. *State v. Yancey*, 69 S.W.3d 553, 559 (Tenn. 2002). A district attorney general’s failure to consider and articulate all relevant factors in denying the application may constitute an abuse of discretion. *McKim*, 215 S.W.3d at 787 (citing *Bell*, 69 S.W.3d at 178; *Curry*, 988 S.W.2d at 159). The underlying issue that this Court must determine on appeal is whether, as a matter of law, the district attorney general abused his or her discretion in denying pretrial diversion. *State v. Carr*, 861 S.W.2d 850, 856 (Tenn. Crim. App. 1993).

In her application for pre-trial diversion, Defendant stated that she attended Lipscomb University from August 2000 until December 2002. She then transferred to Trevecca Nazarene University in 2003 and received her degree in August 2005. After graduation, Defendant was employed as a teacher at Mt. Juliet High School from August 2005 until September 2006 when she resigned. Defendant reported several jobs outside the educational field between March 2007 and December 2007. Defendant was hired as a teacher and volleyball coach at Gallatin High School in August 2007 and resigned in October 2007 after she was charged with the offense of statutory rape by an authority figure. Defendant does not indicate in the application that she is currently employed.

Defendant reported that she is twenty-six years old and living in Cookeville. Defendant is not married and has no children. Defendant stated that she belonged to the American Legion, Auxiliary 210, and is a past member of the Wilson County Education Association and the Sumner County Education Association. Defendant reported no history of alcohol or drug abuse, and she does not have a prior criminal history. Defendant reported, however, that there were pending charges in Davidson County but does not provide the nature of the charges. Under the section of the application entitled “Defendant’s recitation of the facts of the offense,” Defendant wrote, “I had a physical relationship with [E.I].” Defendant noted in the application that the victim was a “friend.”

In its letter denying Defendant’s request for pretrial diversion, the assistant district attorney general found that Defendant “has nothing in her statistical information to cause concern.” Defendant’s education and lack of a criminal history were “commendable.” As negative factors, the assistant general attorney considered the circumstances of the offense, noting that:

[i]n seeking pretrial diversion, to say that “I had a physical relationship with [E.I.]” does little in an expression of any remorse or acknowledgment of any

wrongdoing. This Defendant was a teacher, a teacher in a high school where the students should be learning respect for authority. This young man was at a very vulnerable age where having sexual relations with a teacher was probably considered to be a feather in his cap. A 17-year-old student should not be placed in a position where the line between student and teacher no longer exists. This Defendant made a mockery of the education profession and used her position as a teacher to engage this 17-year-old into sexual liaisons, deceiving his parents and exploiting him.

In regard to Defendant's amenability to rehabilitation and the need for deterrence, the assistant district attorney general "found it interesting to note" that during the investigation, an anonymous source contacted the investigating officer and suggested he check into Defendant's relationship with a student at Defendant's prior place of employment, Mt. Juliet High School. Detective Bailey interviewed a young man who had been a senior in one of Defendant's classes. The young man's relationship with Defendant began with flirtatious notes written on the student's exams while he attended Defendant's class. The student put his cell number on Defendant's cell phone, and she began sending him text messages. Defendant told the student that she wanted to wait until he turned eighteen before engaging in sexual relations. After he turned eighteen on December 18, 2005, the student and Defendant engaged in sexual intercourse. The young man said that he and Defendant were interviewed by the principal, and Defendant resigned her position as teacher after the relationship was disclosed. Defendant's personnel file does not reflect any information about the incident, although the principal told the investigating officers that "he remembered something about the young man and the defendant." As for Defendant's other pending charges, the assistant district attorney general noted that "to the best of [her] knowledge, [Defendant] is charged with six counts of statutory rape by an authority figure in Davidson County." The record reflects that the victim in the Davidson County cases is the same person as the victim in the case *sub judice*.

The assistant district attorney general also found important the need for deterrence. Defendant's case received media attention because of the increase in sexual offenses involving minor students and teachers, and the letter identifies eight of the most recent cases. The assistant district attorney general noted:

[t]hese are but a fraction of the cases involving sexual relations between teachers and students from Tennessee and across the nation. The deterrence factor in this case is extremely important. Others in the same position must be given the warning that if you make the decision to have sex with a teen student – you will be prosecuted.

Finally, the assistant district attorney general considered the investigating officer's strong opposition to pretrial diversion in his case. "As a parent, [the investigating officer] feels strongly that neither his children nor anyone else's children should attend schools where the environment exists that teachers use their positions to have sexual relationships with students." Based on the facts and circumstances of the case and the need for deterrence, the assistant district attorney general denied Defendant's request for pretrial diversion.

At the certiorari hearing, the trial court began by noting that the assistant district attorney general in her letter of denial detailed the factors favoring diversion and those against the grant of diversion but did not explain how or why the negative factors outweighed the positive. The assistant district attorney general acknowledged that she did not explain the weighing process in her letter but argued that it was clear from her detailed response to Defendant's request that she weighed the positive and negative factors. After argument of counsel, the trial court found that it was implicit in the assistant district attorney general's denial of Defendant's request for pretrial diversion that the negative factors – the circumstances of the offense, Defendant's lack of amenability to rehabilitation, the need for deterrence, and the ends of justice – outweighed the positive factors – Defendant's social history, lack of a criminal history, and education. The trial court found that there was substantial evidence to support the denial of pretrial diversion and denied Defendant's writ of certiorari.

Relying on *State v. McKim*, Defendant argues on appeal that the assistant district attorney general's failure to articulate the weight afforded each factor considered and to explain why the negative factors outweighed those factors favoring diversion constituted an abuse of discretion which could not be corrected by the trial court. The State argues that it is clear from the detailed response that the assistant district attorney general considered all of the relevant factors. The State points out that although the *McKim* court found that the failure to consider all relevant factors was an abuse of discretion, it did not expressly state that the failure to weigh the factors, by itself, constituted an abuse of discretion. The State urges this Court to consider "the prosecutor's thorough discussion of all factors and not its failure to include a rote statement that the factors against pretrial diversion outweighed those in favor."

In *McKim*, our supreme court instructed:

If the prosecutor denies the application, "the factors upon which the denial is based must be clearly articulable and stated in the record." *State v. Herron*, 767 S.W.2d 151, 156 (Tenn. 1989), *overruled in part on other grounds by State v. Yancey*, 69 S.W.3d 553, 559 (Tenn. 2002). "This requirement entails more than an abstract statement in the record that the district attorney general

has considered [all relevant] factors.” *Id.* Rather, “[i]f the district attorney general denies pretrial diversion, that denial must be written and must include both an enumeration of the evidence that was considered and a discussion of the factors considered and weight accorded each.” *Pinkham*, 955 S.W.2d at 960; *see also Bell*, 69 S.W.3d at 178 (reiterating that the district attorney general must not only consider all relevant factors, including evidence favorable to the defendant, he or she must also weigh each factor and must explain in writing how a decision to deny pretrial diversion was determined). A district attorney general’s failure to consider and articulate all relevant factors constitutes an abuse of discretion. *Bell*, 69 S.W.3d at 178; *see also Curry*, 988 S.W.2d at 159.

*McKim*, 215 S.W.3d at 787.

The issue presented in *McKim* was the propriety of the district attorney general’s reliance on a personal belief that criminally negligent homicide should not be a divertible offense in denying the defendant’s request for pretrial diversion, not the weighing analysis employed as is the case *sub judice*. In *Bell*, however, the assistant district attorney failed to consider certain factors favorable to diversion *and* “failed to set forth this favorable evidence in writing, weigh it against the other factors, and reach a conclusion based on the relative weight of all of the factors.” *Bell* 69 S.W.3d at 177-78 (emphasis added). As the *Bell* court instructed, “the district attorney general, when denying pretrial diversion, must consider all relevant factors, including evidence favorable to the defendant, must weigh each factor, and must explain in writing how the decision to deny pretrial diversion was determined.” *Id.* at 178. Explaining how the decision was reached must include a detailed explanation as to *why* the negative factors outweighed the positive factors. The failure to satisfy these requirements constitutes an abuse of discretion. (Emphasis added). *Id.*; *see also Herron*, 767 S.W.2d at 156 (stating that only by assigning due significance to all relevant factors is a “meaningful appellate review” possible “and the likelihood sustained that pretrial diversion will serve the ends of justice and the best interest of both the public and the defendant”).

A remark made by the assistant district attorney general during the trial court’s hearing on Defendant’s petition for writ of certiorari reflects that she knew the State’s responsibility to provide clear and explicit (and not merely implicit) explanations for the denial of pretrial diversion:

And maybe I should have put a sentence there, I’ve weighed the positive factors; I’ve weighed the negative factors; and the negative factors outweigh the positive factors **and this is why**. I didn’t do that, but I think it’s clear from my response that I weighed those factors. (Emphasis added).

As the trial court observed in the case *sub judice*, one may infer that the assistant district attorney general determined that the negative factors outweighed the positive by virtue of the denial of Defendant's request for pretrial diversion. A trial court's review following a petition for writ of certiorari, however, is limited. *McKim*, 215 S.W.3d at 788. "The trial court must focus on the prosecutor's methodology rather than the intrinsic correctness of his or her decision, and the trial court should therefore not engaged in reweighing the evidence considered by the district attorney general. *Id.* (citing *Yancey*, 69 S.W.3d at 588-89). Instead, "the trial court must only determine whether the district attorney general has abused his or her discretion by failing to consider and weigh all of the relevant factors or by reaching a decision this is not supported by substantial evidence." *Bell*, 69 S.W.3d at 179 (citing *Curry*, 988 S.W.2d at 158; *State v. Hammersley*, 650 SW.2d 352, 355 (Tenn. 1983)).

In this instance, the trial court essentially assigned a weight to each negative and positive factors which had been omitted by the assistant district attorney general in her response. However, as the *Bell* court observed, "a court cannot reasonably conclude that there is substantial evidence to support the district attorney general's decision if in fact the district attorney general has not first considered all of the relevant factors and their relative weight." The proper remedy in a situation such as the one presented here is for the trial court to reverse the assistant district attorney general's decision and remand the matter for further consideration and a weighing of all of the factors relevant to the pretrial diversion determination. *McKim*, 215 S.W.3d at 788 (citing *Bell*, 69 S.W.3d at 180). In connection thereto, we observe that more than a "rote statement" that the negative factors outweigh the positive factors is required. The assistant district attorney general must assign a weight to each factor, both favorable and unfavorable, weigh the factors against each other, and reach a conclusion based on the relative weight of all factors. *Bell*, 69 S.W.3d at 177-78.

We acknowledge that Defendant raises other challenges to the assistant district attorney general's considerations of her request for pretrial diversion. Specifically, Defendant contends that the assistant district attorney general placed too much emphasis on her brief response to the application's inquiry as to the facts of the offense as an indication of Defendant's lack of remorse. While a defendant's lack of remorse may be considered in determining whether diversion is appropriate, "remorse per se is not a factor in determining suitability for pretrial diversion." *State v. Glen Andrew Adams*, No. E2007-01754-CCA-R3-CD, 2008 WL 3245565, at \*5 (Tenn. Crim. App., at Knoxville, Aug. 8, 2008), *no. perm. to appeal filed* (internal citations omitted). Nonetheless, there were other factors reflecting unfavorably on Defendant's amenability to correction including the pending charges in Davidson County and the revelation that a similar situation between Defendant and a student at Mt. Juliet High School had occurred before the current offense. Having said that, however, it is impossible to determine the role these factors played in the assistant district



attorney general's decision to deny diversion because of the failure to indicate what weight was placed on each factor and how the factors were balanced against the positive factors.

Likewise, Defendant contends that the investigating officer's opinion as to her suitability for diversion was an irrelevant factor for the assistant district attorney general's consideration. We observe that the attitude of law enforcement officers toward an applicant for pretrial diversion is a proper consideration. *State v. Markham*, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988). Once again, however, it is impossible to ascertain from the record before us the significance, if any, placed on the officer's negative attitude toward the grant of pretrial diversion.

### CONCLUSION

Based on the foregoing, we reverse the trial court's order affirming the denial of pretrial diversion and remand this matter for further proceedings consistent with this opinion. Specifically, the trial court shall reverse the decision of the assistant district attorney general and remand in order for the assistant district attorney general to "consider all relevant factors, including evidence favorable to the defendant, [to] weigh each factor, and [to] explain in writing how the decision to deny pretrial diversion was determined." *Bell*, 69 S.W.3d at 178.

---

THOMAS T. WOODALL, JUDGE